APPENDIX A-1

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 80-2273, 80-2274, 80-2275
CONSOLIDATED

KERR-MCGEE CORPORATION, a Delaware corporation,
Plaintiff-Appellant,

v.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Defendant-Appellee,

NORTHERN UTILITIES, INC.,
Plaintiff-Appellee,

v.

AMOCO PRODUCTION COMPANY, a Delaware corporation,
and PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
Defendants-Appellants.

Appeal From The United States District Court
For The District of Wyoming
(D.C. No. C78-006B and C78-081-B)
Consolidated

SLIP OPINION

FILED
United States Court of Appeals
Tenth Circuit
MAR. 23 1982
HOWARD K. PHILLIPS
Clerk

Peter J. Nickles of Covington & Burling, Washington, D.C. (Stephen H. Galebach of Covington & Burling and William T. Schwartz of Schwartz, Bon, McCrary & Walker, Casper, Wyoming, with him on the brief) for Kerr-McGee Corporation.

John S. Pfeiffer of Gorsuch, Kirgis, Campbell, Walker and Grover, Denver, Colorado (Ann E. DeVine of Gorsuch, Kirgis, Campbell, Walker and Grover, and Robert H. Landt of Amoco Production Company, Denver, Colorado, with him on the brief) for Amoco Production Company.

Houston G. Williams of Williams, Porter, Day & Neville, P.C., Casper, Wyoming (Thomas M. Blume and Frank A. Ackerman of Phillips Petroleum Company, Englewood, Colorado, with him on the brief), for Phillips Petroleum Company.

Wm. Bryce Arendt, of Northern Utilities, Inc., Casper, Wyoming and Wm. H. Brown of Brown, Drew, Apostolos, Massey & Sullivan, Casper, Wyoming (Claude W. Martin of Brown, Drew, Apostolos, Massey & Sullivan with them on the brief), for Northern Utilities, Inc.

B. J. Zimmerman and Patrick F. Timmons, Attorneys for The Superior Oil Company, Houston, Texas; Joseph C. Johnson and Thomas Burton, Attorneys for Conoco, Inc., Houston, Texas; and Robert C. Hawley and Gretchen A. VanderWerf of Dechert, Price & Rhoads, Denver, Colorado, on the brief for Amici Curiae for Conoco, Inc. and The Superior Oil Company.

David Crump, Professor of Law, University of Houston, Houston, Texas; Susan E. Waite of Legal Foundation of America; Keith Blinn, Professor of Law, University of Houston, Houston, Texas, on the brief for Amicus Curiae for Legal Foundation of America.

Steven F. Freudenthal, Attorney General of Wyoming, Cheyenne, Wyoming, on the brief for Amicus Curiae for the State of Wyoming.

Before SETH, HOLLOWAY, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

In this diversity action applying Wyoming law, Kerr-McGee Corporation, Amoco Production Company, and Phillips Petroleum Company (hereinafter collectively referred to as "producers") appeal a trial court decision striking down an indefinite price escalation clause in a contract for the sale of intrastate natural gas. The district court found the clause to be against public policy and unconsionable.[1] We reverse.

IN 1957, the predecessor of Amoco contracted to sell appellee Northern Utilities, Inc. intrastate natural gas from the Beaver Creek field in Wyoming. Amoco, Kerr-McGee, and Phillips owned working interests in the field and Amoco acted as unit operator. Northern is an intrastate public utility regulated by the Public Service Commission of Wyoming. Northern obtains approximately 85% of its total supply of gas from the Beaver Creek field and sells about 40% of the Beaver Creek gas to Amoco and its affiliates at facilities in Wyomong.

The original contract term between Northern and producers was for twenty years, beginning in 1958. It provided for price increases under a two-party favored nations clause that pegged the price of gas to the price Northern paid any other seller.[2]

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[1] The opinion below is published at 500 F. Supp. 624 (D. Wyo. 1980).

[2] The favored nations clause provided that:

> "If, at any time during the term of this agreement, Northern pays a producer of gas in the State of Wyoming a price per one thousand (1,000) cubic feet that is higher than the price being paid or otherwise payable under this contract, due consideration being given to the quality of the gas, bases of measurement and conditions of sale, Northern shall, commencing on the date of delivery of such gas at such higher price, and continuing so long as such price is in excess of the price otherwise payable under this contract, increase the price being paid or otherwise payable

The contract also granted Northern a preferential right to negotiate "for a suitable contract and price" for excess gas which might become available from Beaver Creek. App., vol. II, at 157. Northern executed contracts with Kerr-McGee and Phillips in 1958, which were identical in all relevant respects to its contract with Amoco.[3]

In 1970, Amoco notified Northern that excess gas from Beaver Creek was available for sale and invited Northern to negotiate for the purchase of the gas pursuant to its contract rights. The record indicates that Amoco, on behalf of the producers, wanted to sell the gas before the original contract was due to expire at the end of 1977. On the other hand, Northern wanted to delay production of the gas until 1978 and extend the term of the original contract.

After several months of negotiation, Amoco and Northern entered into a supplemental agreement which extended the contract through the end of 1990. The two-party favored nations clause was retained, and a new clause was added which is the subject of this litigation. The new clause, paragraph 6(b), is a third-party favored nations (or indefinite price escalator) clause. Under this provision, effective January 1, 1976, a rise in the contract price was to be triggered by the price received from the sale of *interstate* gas by *any* producer in the relevant area.[4] The supplemental contract was presented by Northern

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to Pan American hereunder to equal such higher price. It is the intention hereof that the price to be paid Pan American hereunder shall at all times be equal to the higher of the following: (a) the price payable under Article 5 of this contract, as such price may have been changed by Article 7, or (b) the highest price paid by Northern to a producer of gas in the State of Wyoming."

App., vol. II, at 149-50.

[3] The original contract was amended four times prior to 1970. These amendments are irrelevant to the instant appeal.

[4] The added paragraph provided that:

"(b) From and after January 1, 1976, when the price to be paid by Northern to Pan American pursuant to other provisions hereof is less than the sum of the price received for gas being sold

to the Wyoming Public Service Commission and approved for filing. Substantially similar contracts were executed in 1973 between Northern and Kerr-McGee, and Northern and Phillips, after Northern wrote to Kerr-McGee and Phillips urging them to execute the supplementary agreements.

In 1975, Amoco advised Northern that the price under the new contract would be set by paragraph 6(b) beginning January 1, 1976, because the price received by producers of interstate gas in the area would then exceed the rate established under other provisions of the contract. Northern requested and received approval from the Public Service Commission for a rate increase to cover the rise in the contract price. Amoco agreed to phase in the new prices until July 1, 1978, at which time the indefinite price escalator clause would become fully operative. Kerr-McGee did not agree to phase in the price and brought suit against Northern. Northern then sued Amoco and Phillips, and the actions were consolidated below.

After a bench trial, the judge held paragraph 6(b) void. He found that the operation of the clause would result in "exorbitant prices" beyond Northern's contemplation at the time the contract was executed. He emphasized that the issue involved a substantial public interest, and concluded that enforcement of paragraph 6(b) was contrary to public policy and unconsionable. He ordered that the remainder of the contract be enforced without the operation of paragraph 6(b).

On appeal the producers contend that the clause is not contrary to federal policy as it is articulated in the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.* (NGPA), or to

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in interstate commerce, by any producer within the State of Wyoming, except in the counties of Uinta and Lincoln, plus three cents per one thousand cubic feet (3¢/Mcf), then Northern shall increase the price to be paid Pan American hereunder to a price equal to the price being received by such producer plus three cents per Mcf."

App., vol. II, at 214.

Wyoming public policy. They also argue that the court's decision flies in the face of controlling Wyoming court pronouncements on both public policy and unconscionability. We agree and hold as a matter of law that paragraph 6(b) is not violative of public policy nor unconsionable under the facts of this case.

I.

PUBLIC POLICY

A. *Federal Public Policy*

Prior to the enactment of the NGPA, contracts for the sale of intrastate gas were free from regulation. Thus, it was public policy to allow the competitive forces of the market place to set the price. The NGPA, however, imposed price controls on the intrastate gas market. *See* 15 U.S.C. 3315.[5] The Act specifical-

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[5] This section provides in pertinent part:

"§ 3315. Ceiling price for sales under existing intrastate contracts.

(a) Application.—The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978.

(b) Maximum lawful price.—

(1) General rule.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—

(A) the price under the terms of the existing contract, to which such natural gas was subject on November 9, 1978, as such contract was in effect on such date; or

(B) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title (relating to new natural gas).

(2) Contract price exceeding new gas ceiling price on November 9, 1978.—In the case of any natural gas described in subsection (a) of this section for which the contract price applicable on November 9, 1978, exceeds the maximum lawful price, per million Btu's, computed

ly permits the price under intrastate gas contracts to rise through the operation of indefinite price escalator clauses up to a maximum rate established by the Act. *See id.*; 18 C.F.R.

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for such date under section 3312 of this title (relating to new natural gas), the maximum lawful price under this section shall be the higher of—

(A) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title; or

(B)(i) the contact[1] price on November 9, 1978, in the case of November 1978; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(3) Price increases resulting from indefinite price escalator clauses.—

(A) In general.—Effective January 1985, and each month thereafter, in the case of any first sale of natural gas, which is sold at a price established under any indefinite price escalator clause of any existing contract or successor to an existing contract and for which the contract price on December 31, 1984, is higher than $1.00 per million Btu's, the maximum lawful price under this section for any such natural gas delivered during any month shall be the higher of—

(i) the maximum lawful price, per million Btu's, computed under paragraph (2)(B); or (ii)(I) in the case of January 1985, the maximum lawful price, per million Btu's, computed under section 3312 of this title (relating to new natural gas) for such month; and

(II) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this clause for the immediately preceding month multiplied by the monthly equivalent of the sum of a factor equal to the annual inflation adjustment factor applicable for such month plus. 03.

(B) Definition of indefinite price escalator clause.—For purposes of this paragraph, the term "indefinite price escalator clause" includes any provision of any contract—

(i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference

§ 270.205 (b)(1) (1980)[6] *Pennzoil Co.* v. *FERC*, 645 F.2d 368, 360 (5th Cir. 1981).

The ceiling prices set by the NGPA clearly comport with the public interest as determined by Congress. *Pennzoil*, 645 F.2d at 379 n.37. The fact that prices under intrastate gas contracts containing indefinite price escalator clauses are high and will continue to rise does not mean that these contracts are against federal public policy. One of the primary purposes of the NGPA is to promote energy conservation. Congress believed that allowing producers to recover high prices for their gas helps implement this goal. "High energy prices provide one motivation to conserve energy. Because of these prices, an enormous range of energy conserving improvements are cost effective." S. Rep. No. 409, 95th Cong., 2d Sess. 36, *reprinted in* 1978 U.S. Code Cong. & Ad News 8800, 8806.

The only reason appearing in the district court's opinion to support its conclusion that the clause offends public policy is its finding of "exorbitant" cost to the consumer.[7] However, when

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to other prices for natural gas, for crude oil, or for refined petroleum products; or (ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

[5] So in original. Probably should be "contract".

15 U.S.C. § 3315.

[6] 18 C.F.R. § 270.205(b)(1) (1981) provides in pertinent part:

"Any contractual provision for a change in price may operate according to the terms of such provision except that such provision is not operative to authorize a seller to charge and collect an amount in excess of the highest applicable NGPA rate."

[7] The judge indicated that he found the price particularly offensive because it was unrelated to the cost of production, and was higher than the producers themselves could have received for the gas in an interstate sale. The producers could not qualify for the "small producers" rate established for gas sales in interstate commerce, which was set at 130% of the ceiling rate established for large producers. *See*

Congress designed the NGPA, "[t]he balance Congress struck already took into account the conflicting interests of producers and consumers." *Pennzoil*, 645 F.2d at 379. Congress was well aware of the economic impact on consumers that would result from the operation of indefinite price escalator clauses. The decision to permit contract clauses to raise prices to a ceiling constitutes a clear legislative statement that the resulting high cost to the consumer is not contrary to federal energy policy.

B. *Wyoming Public Policy*

We must look to the statutes and judicial decisions in Wyoming to determine that state's public policy with regard to the price escalation clause in this case. *See Taylor* v. *State*, 612 P.2d 851, 865 (Wyo. 1980) (Rooney, J., concurring).

Although Congress specifically legislated in the NGPA regarding pricing of intrastate gas, it nevertheless provided that states may restrict the operation of indefinite price escalator clauses if they choose to do so. *See* 15 U.S.C. § 3432(a).[8]

> "The conference agreement also cedes the Federal Government's authority to further limit the operation of indefinite price escalator clauses to State governments

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F.P.C. Opinion No. 742 (Aug. 28, 1975). However, paragraph 6(b), by pegging the contract cost to the price received by *any* producer selling interstate gas, allowed the producers to receive the "small producers" rate for interstate sales. Moreover, paragraph 6(b) contains no vintaging distinction between old and new gas. The ceiling rates for old gas sold in interstate commerce are lower than those for new gas. *See American Pub. Gas Ass'n* v. *FPC*, 567 F.2d 1016, 1033 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). Through the operation of 6(b), therefore, the producers here could receive the new gas rate for old gas. *See Amoco Prod. Co.* v. *Stauffer Chem. Co.*, 612 P.2d 463, 466 (Wyo. 1980).

[8] This sections provides:

"§ 3432. Effect on state laws.

"(a) Authority to prescribe lower maximum lawful prices.—Nothing in this chapter shall affect the authority of any State to

> wishing to do so. The Congress, by adoption of this section, recognizes the right of States to prescribe more stringent limitations on the operation of such clauses than those prescribed herein."

H.R. Conf. Rep. No. 1752, 95th Cong. 2d Sess. 83, *reprinted in* 1978 U.S. Code Cong. & Ad. News 8983, 9000.

Some states have exercised their right to alter the public policy expressed in the NGPA by enacting greater restrictions on the use of indefinite price escalation clauses. *See, e.g.*, Kan. Stat. Ann. 1980 Supp. § 55-1401 *et seq.*; *Energy Reserves Group* v. *Kansas Power & Light Co.*, 630 P.2d 1142, 1150-53 (Kan. 1981). We believe it is significant that the Wyoming legislature has not enacted any restrictions on the operation of clauses such as the one at issue in this case.

Moreover, in *Amoco Production Co.* v. *Stauffer Chemical Co.*, 612 P.2d 463 (Who. 1980), the Wyoming Supreme Court approved the enforcement of a favored nations clause contained in an intrastate gas contract. Contrary to the assertion of the trial court in this action, the briefs of the parties in *Stauffer* reflect that the issue whether favored nations clauses are against public policy was argued to the Wyoming court in that case. Despite the public policy argument, the Wyoming Supreme Court ordered the clause to be given effect, stating that

> "[f]avored nations clauses are a common feature of gas purchase and sale contracts. The nature of the product and its questionable availability engenders reluctance on the part of producers to enter into long term contracts at the price prevailing at the time of contract. Yet purchasers require long term commitments to insure an adequate supply of gas. A two-party favored nations clause pro-

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establish or enforce any maximum lawful price for the first sale of natural gas produced in such State which does not exceed the applicable maximum lawful price, if any, under subchapter I of this chapter."

> vides an increase in price to match any higher price which the purchaser pays to any other seller. A third-party favored nations clause requires the purchase to match any higher price contracted to be paid by any other buyer in the same field or area. . . . Favored nations clauses are recognized by the courts. *Superior Oil Company* v. *Western Slope Gas Company*, 10th Cir. 1979, 604 F.2d 1281; *Holly Sugar Corporation* v. *Fritzler*, 42 Wyo. 446, 296 P. 206 (1931); *Texas Gas Transmission Corporation* v. *Shell Oil Company*, 363 U.S. 263, 80 S.Ct. 1122, 4 L.Ed.2d 1208 (1960).
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> ". . . The principal objective of [a third party favored nations clause] is to escalate the agreed price to equal the *highest* price being paid for the commodity by any other purchaser."

Stauffer, 612 P.2d at 468 (footnotes omitted) (emphasis in original).

The opinion in *Stauffer* and the failure of the Wyoming legislature to alter the policy expressed by the NGPA clearly indicate that indefinite price escalation provisions are not against the public policy of the state of Wyoming. Accordingly, the trial court's conclusion that the clause at issue here offends public policy is without legal foundation.[6]

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[6] In so stating, we have considered the concurring opinion in *Superior Oil Co.* v. *Western Slope Gas Co.*, 604 F.2d 1281, 1291 (10th Cir. 1979). Contrary to the concurrence, we do not view the purpose of the remand by the majority in that case to include a determination whether favored nations clauses are void as contrary to public policy. The majority opinion rests, implicitly if not explicitly, on the proposition that such clauses do not violate public policy. The majority emphasized the amicus curiae brief filed with the trial court by the Public Utilities Commission of the State of Colorado (PUC) urging that favored nations clauses *not* be declared contrary to public policy, even though they permit the price of gas to rise above a price directly related to the cost of production. The majority agreed with the PUC that "[t]he actual value of a product is determined by what people will pay for it, not by what it costs to produce." *Id.* at n.15. The majority also noted that the NGPA "provides for a free market between producers and purchasers in the long run." *Id.* at n.16.

II.

UNCONSIONABILITY

The trial court also held paragraph 6(b) to be unconsionable, citing section 34-21-219 of the Wyoming statutes.[10] The court's conclusion of unconsionability rests on the dramatic rise in the cost of gas resulting from the effect of the price escalator clause. The producers contend on appeal that the court used an incorrect legal standard in making its determination, and that the record contains no evidence to support its conclusion.

The leading Wyoming case on unconsionability, *In re Estate of Frederick*, 599 P.2d 550 (Wyo. 1979), was inexplicably not cited or considered by the trial judge in his opinion. In *Frederick*, the Wyoming Supreme Court pointed out its "reluctance to redraw contracts for the parties," *id.* at 556, and stated that "[i]n the absence of overreaching, the court should not aid those who have made an unwise bargain in the formation of the contract." *Id.* Under Wyoming law,

> *"[u]nconsionability is tested as of the time the agreement is made and not in accordance with hindsight. . . .* It is considered as a form of fraud recognized in equity, but such fraud should be 'apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one

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[10] That section provides:

> "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> "(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

Wyo. Stat. § 34-21-219.

> hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains.' . . . The Supreme Court of Oklahoma has defined the test of unconscionability as whether, 'under the circumstances existing at the time of making of the contract, and in light of the general commercial background and commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties.' "

Id. (citations omitted) (emphasis added).

The considerations set out in *Frederick* relevant to a determination of unconscionability are whether: 1) the protesting party was deprived of meaningful choice as to whether to enter into the contract; 2) the party was compelled to accept the terms; 3) there was opportunity for meaningful negotiation; and 4) there was gross inequality of bargianing power. *Id.* at 556. The burden is on the complaining party to "demonstrate that the clause in question was unconscionable at the time the contract was made." *W. L. May Co.* v. *Philco-Ford Corp.*, 543 P.2d 283, 286 (Ore. 1975).

The commercial circumstances surrounding the execution of the supplemental agreement are evidenced by the record on appeal in this case. Mr. Magagna, the representative from Northern who negotiated the contracts with Amoco, testified that Northern could not use the additional gas at the time it was offered for sale by Amoco and sought instead to obtain a contract extension to use the gas "down the line." App., vol. I, at 62. Amoco wanted to recover the price of the gas immediately. Magagna further testified that he and the people from Amoco negotiated back and forth for several months, *id.* at 63, and that one of the benefits to Northern from the new contract was the assurance of a twenty-year supply of gas for its customers. *Id.* at 78. We note, as did the Court in *Stauffer*, 612 P.2d at 468, that favored nations clauses constitute the quid pro quo that induces producers of natural gas to enter into long-term contracts. In its statement to the Public Service Commission accompanying its submission of the contract for approval, Northern referred to the difficulty in obtaining long-

term commitments, and the advantages it believed it would receive from the amended contract.[11] Moreover, in a series of letters over a two-year period, Northern urged Kerr-McGee

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[11] That statement provided in relevant part:

"In 1957, according to our best estimates, Northern Utilities Company and Northern Gas Company had adequate gas supplies for the ensuing twenty (20) year period. Since 1957, many changes have occurred, some of the principal ones being:

> *First*—Thirteen (13) years have elapsed and a substantial part of the gas supplies on hand in 1957 have been depleted and are continuing to be depleted each year . . . .
>
> "*Second*—There has been a substantial increase in the demand of both companies for gas service . . . .
>
> "*Third*—The national demand for natural gas has resulted in various large interstate pipelines becoming competitive for natural gas supplies available in Wyoming. These interstate companies are offering various types of bonuses in order to obtain calls on any gas which may be produced, such as participating in drilling costs, making advance payments for future gas deliveries, making interest free loans, etc. These interstate companies are agreeing to take or pay for substantial volumes of gas in the initial years in order to provide a fast well payout. These interstate companies are also agreeing to accept delivery of gas at wellhead and to install and operate, at Buyer's expense, to the extent required, all gathering, dehydrating and compression facilities. All natural gas producers are anxious to deliver substantial volumes of gas as soon as wells are completed because of the high "present worth" of money. It is very difficult for an intra-state gas distribution company, with a relatively limited market and highpeak demands and a low load factor, to compete against these interstate companies and negotiate any long term gas supply contracts.

* * * *

"Northern Utilities, Inc., received a letter dated April 7, 1970 from Pan American Petroleum Corporation [predecessor of Amoco] relative to gas being produced at Beaver Creek Field, Fremont County, Wyoming, reading as follows:

> 'As provided in Article 8.(d) of the contract referenced above, Pan American hereby serves notice that it has more than 60 BCF

and Phillips to execute supplementary contracts with provisions identical to Northern's contract with Amoco.

The trial court found that the sharp price increases were not contemplated by Northern at the time of contracting. This finding cannot support a determination of unconsionability under Wyoming law. "The risk of the effects of inflation . . . however, is inherent in any contract which includes an option to purchase in the future. Mere increase in the value . . . does not invalidate a contract . . . ." *Frederick*, 599 P.2d at 556.

In construing the Utah provision of the Uniform Commercial Code, which is identical to Wyo. Stat. § 34-21-219 cited by the trial court here, this court reiterated that "an increase in price has nothing to do with unconscionability." *Bernina Distributors, Inc.* v. *Bernina Sewing Machines*, 646 F.2d 434, 440 (10th Cir. 1981). In *Bernina*, we pointed out that

> "the principle of that provision is one of 'prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.' In order to avail oneself of the section, proof must show the contract is 'so one-sided as to be unconscionable

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of gas in the reservoirs identified in the contract, which exceed the maximum quantity specified in Exhibit "B".

'Pan American desires to sell the 60 BCF coextensively with the gas sales already contemplated.

'Accordingly, we invite you to exercise your right to negotiate for the purchase of the additional gas quantity.'

"As set forth in the letter Pan American Petroleum Corporation desired to market this additional gas during the next eight years. In order to provide future gas service for the customers of Northern Utilities, Inc. and of Northern Gas Company, we desired to have the production of this gas delayed until after 1978. After six (6) months of negotiations we have entered into the following agreements which we are submitting for filing at this time . . . ."

App., vol. II, at 125-28.

> under the circumstances existing *at the time of the making* of the contract.' "

Id. (quoting Uniform Commercial Code § 2-302, comment 1) (emphasis in original).

In this case, experienced negotiators for both parties entered into an agreement after several months of give-and-take. Northern was not compelled to enter into the contract and clearly believed the contract terms were to its advantage at the time of execution and for several years thereafter. Based on our review of the record, we conclude as a matter of law that Northern failed to demonstrate unconscionability under Wyoming law.

In upholding this contract, we are mindful that "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515, 552 (1936). The courts have power to implement the public interest. The prerequisite to the exercise of this equitable power, however, is a determination of where the public interest lies. In this case, the rise in gas prices borne by the consumer as the result of this contract, which the trial court found so disturbing, is not contrary to either federal or Wyoming public policy, nor is it the result of unconscionability.

The decision of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX A-2

Order Denying Rehearing Of Opinion Of Court Of Appeals Below

Nos. 80-2273, 80-2274, 80-2275 (consolidated)

KERR-MCGEE CORPORATION,
Plaintiff-Appellant,

v.

NORTHERN UTILITIES, INC., A Wyoming corporation,
Defendant-Appellee,

NORTHERN UTILITIES, INC.,
Plaintiff-Appellee,

v.

AMOCO PRODUCTION COMPANY, a Delaware corporation, and PHILLIPS PETROLEUM COMPANY, a Delaware corporation,
Defendants-Appellants.

MAY TERM - JUNE 14, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

This matter comes on for consideration of Appellee's, Northern Utilities, Inc., petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

/s/ By ROBERT L. HOECKER

Robert L. Hoecker
Chief Deputy Clerk

APPENDIX A-3

Order Staying Mandate Pending Application For Certiorari

Nos. 80-2273, 80-2274 and 80-2275
(consolidated)

KERR-MCGEE CORPORATION,
Plaintiff-Appellant,

v.

NORTHERN UTILITIES, INC., A Wyoming corporation,
Defendant-Appellee,

NORTHERN UTILITIES, INC.,
Plaintiff-Appellee,

v.

AMOCO PRODUCTION COMPANY, a Delaware corporation,
and PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
Defendants-Appellants.

LEGAL FOUNDATION OF AMERICA,
THE STATE OF WYOMING and CONOCO, INC.,
SUPERIOR OIL COMPANY,
Amici Curiae.

JULY TERM - August 5, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable Stephanie K. Seymour, Circuit Judges

This matter comes on for consideration of appellee's motion for stay of mandate in the captioned causes pending timely application to the Supreme Court for certiorari.

Upon consideration whereof, the motion for stay of mandate is granted. The mandate shall be stayed until September 4, 1982, pending certiorari, and that if on or before that date there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellee has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

APPENDIX A-4

Opinion And Judgment Of District Court Below

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C78-006B
consolidated with
No. C78-081B

KERR-MCGEE CORPORATION, a Delaware corporation,
Plaintiff,

v.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Defendant.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Plaintiff,

v.

AMOCO PRODUCTION COMPANY, a Delaware corporation,
and PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
Defendants.

FILED
DISTRICT OF WYOMING
OCT. 23, 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having been tried to the Court, on June 25, 26, and 27, 1980, Kerr-McGee Corporation appearing by and through William T. Schwartz, Esq., B. J. Zimmerman, Esq., and Peter J. Nickles, Esq., Northern Utilities, Inc.

appearing by and through William H. Brown, Jr., Esq., Claude W. Martin, Esq., Edwin V. Magagna, Esq., and William Bryce Arendt, Esq., Amoco Production Company appearing by and through John S. Pfeiffer, Esq., and R. H. Landt, Esq., Phillips Petroleum Company appearing by and through Houston G. Williams, Esq., Thomas M. Blume, Esq., and Dale A. Mayer, Esq., and the State of Wyoming, appearing amicus curiae, by and through Steven R. Shanahan, Assistant Attorney General for the State of Wyoming, and the Court having heard the testimony submitted for and on behalf of the parties, and having reviewed the pleadings, the Agreed Statement of Facts, the evidence, the exhibits, and briefs filed for and on behalf of the parties, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The jurisdiction of this Court is founded upon the diversity of citizenship of the parties and the requisite amount in controversy. 28 U.S.C. § 1332.

2. Northern Utilities, Inc. ("Northern"), is a corporation incorporated under the laws of the State of Wyoming, with its principal place of business in Wyoming. Northern Utilities, Inc. is the successor in interest of Northern Utilities Company.

3. Northern is an intrastate public utility, certificated by the Public Service Commission of the State of Wyoming. Northern's rates, its service, and its earnings are regulated by the Public Service Commission of Wyoming. As a public utility, Northern is permitted to earn a fair, just and reasonable rate of return on its capital investment.

4. Kerr-McGee Corporation ("Kerr-McGee"), formerly Kerr-McGee Oil Industries, Inc., is a corporation incorporated under the laws of the State of Delaware, whose principal place of business is Oklahoma City, Oklahoma.

5. Amoco Production Company ("Amoco"), is a corporation incorporated under the laws of the State of Delaware, whose principal place of business is Chicago, Illinois, and who is duly

authorized to transact business in the State of Wyoming. Amoco is the successor in interest of Pan American Petroleum Corporation, which was the successor in interest of Stanolind Oil and Gas Company.

6. Phillips Petroleum Company ("Phillips"), is a corporation incorporated under the laws of the State of Delaware, whose principal place of business is Bartlesville, Oklahoma, and who is duly authorized to transact business in the State of Wyoming.

7. This case involves the interpretation of intrastate Gas Sales Contracts between (1) Amoco and Northern Utilities, dated November 20, 1957, as amended by a Supplemental Agreement, dated October 1, 1970; (2) Kerr-McGee and Northern Utilities, dated October 14, 1958, as amended by a Supplemental Agreement, dated February 23, 1973; and (3) Phillips and Northern Utilities, dated May 20, 1958, as amended by a Supplemental Agreement dated May 4, 1973.

8. Amoco, Kerr-McGee, and Phillips each own working interests in oil and gas leases in the Beaver Creek unit, Fremont County, Wyoming. The ownership interests of the parties in the various formations in the Beaver Creek Field are as follows:

Frontier-Dakota Formation		
Amoco	—	86.35979%
Kerr-McGee	—	5.93651%
Phillips	—	7.70370%
Madison Formation	—	Amoco 100%
Phosphoria Formation	—	Amoco 100%
Tensleep Formation	—	Amoco 100%
Second Cody Formation	—	Amoco 100%
First Cody Formation	—	Amoco 100%

9. All of the natural gas involved in this case is produced from wells producing from the Frontier-Dakota participating

area, and from wells producing from the Phosphoria formation. Such producing wells were commenced (spudded) on various dates between September 1, 1937 and October 31, 1969.

10. Northern's principal service areas are Lander, Riverton, Casper and intermediate communities in Wyoming. Northern sells part of this gas to Northern Gas Company, an intrastate public gas utility which serves Rawlins, Laramie, and intermediate communities. All of the Beaver Creek gas is sold to Northern pursuant to contracts with Amoco, Kerr-McGee and Phillips.

11. Amoco is the unit operator of the Beaver Creek Unit Area (Beaver Creek Field) under a Cooperative Development Contract and Unit Plan dated March 29, 1932, and amendments thereto. As such operator Amoco collects and receives payments from Northern for all of the gas produced and sold from the Beaver Creek Field and distributes to Phillips and Kerr-McGee their respective shares thereof. Amoco also pays all severance taxes, production taxes, ad valorem taxes and all royalties for its account and for the account of Phillips and Kerr-McGee. Northern obtains approximately 85% of its total supply of gas from the Beaver Creek Field under the above-mentioned Gas Sales Contracts. Northern sells to the Standard Refinery in Casper (an affiliate of Amoco) and to Amoco at Salt Creek and Winkleman Dome gas volumes approximating 40% of the total annual volume purchased from Beaver Creek. Northern receives for gas delivered to said points a price per Mcf equal to the price it pays for Beaver Creek gas at the Beaver Creek Field plus a fee of 5 cents per Mcf for gas delivered to the Casper refinery, 6 cents per Mcf for gas delivered to Salt Creek and 9 cents per Mcf for gas delivered to Winkleman Dome. The obligation of Northern to sell and deliver such quantities extends to the expiration of the Supplement, December 31, 1990.

12. Northern and Amoco entered into a twenty-year Gas Sales Contract dated November 20, 1957 (herein referred to as the "1957 Amoco Contract"), in which Amoco agreed to sell and Northern agreed to buy all of Amoco's Beaver Creek gas, up to

maximum quantities specified therein. Northern and Kerr-McGee entered into a Gas Sales Contract dated October 14, 1958, (the "1958 Kerr-McGee Contract"), in which Kerr-McGee agreed to sell and Northern agreed to buy all of Kerr-McGee's gas, up to the maximum quantities specified therein, allocated to or owned by Kerr-McGee from certain lands and formations in the Beaver Creek Field. Northern and Phillips entered into a Gas Sales Contract dated May 20, 1958 (the "1958 Phillips Contract") wherein Phillips agreed to sell and Northern agreed to buy all of Phillips' gas, up to the maximum quantities specified therein, allocated to or owned by Phillips from certain lands and formations in the Beaver Creek Field, at the same price and in accordance with the other relevant terms of the 1957 Amoco Contract. All of the terms of the 1958 Kerr-McGee Contract and the 1958 Phillips Contract relevant to this lawsuit are identical to those in the 1957 Amoco Contract. Both Phillips and Kerr-McGee ratified the 1957 Amoco Contract without negotiations with Northern.

13. The 1957 Amoco Contract was amended four times prior to 1970, but these amendments did not make changes in the contract price. The first and third amendments incorporated into the contract deliveries of Sherwood Unit Gas produced in Natrona and Converse Counties, Wyoming. These amendments are no longer of concern, the Sherwood Unit Gas having been exhausted. The second amendment changed the point of delivery to the Beaver Creek Gas. The fourth amendment concerned the sale by Amoco to Northern of its wholly-owned gas from the Phosphoria formation in the Beaver Creek Field.

14. In April, 1970, pursuant to Amoco's letter, Northern and Amoco entered into negotiations which were carried on in Amoco's Denver office and which culminated in the Supplemental Agreement dated October 1, 1970 amending the 1957 Amoco Contract (herein referred to as the "Amoco Supplement" or the "Supplement") and a number of related or collateral agreements referred to elsewhere herein. On February 23, 1973, Northern and Kerr-McGee entered into a Sup-

plemental Agreement (the "Kerr-McGee Supplement") wherein all relevant terms were identical with those in the supplement negotiated by Amoco and Northern. On May 4, 1973, Phillips and Northern entered into a Supplemental Agreement (the "Phillips Supplement") amending said 1958 Phillips Contract wherein all relevant terms were identical with those in the Supplement negotiated by Amoco and Northern.

15. Paragraph 4 in each of said supplements provides as follows:

> "4. The paragraph comprising present Article 6, Favored Nations Clause, is designated (a), and the following new paragraph (b) is added to said Article 6:
>
> > "(b) From and after January 1, 1976, when the price to be paid by Northern to Pan American pursuant to the other provisions hereof is less than the sum of the price received for gas being sold in interstate commerce, by any producer within the State of Wyoming, except in the counties of Uinta and Lincoln, plus three cents per one thousand cubic feet (3¢Mcf), then Northern shall increase the price to be paid Pan American hereunder to a price equal to the price being received by such producer plus three cents per Mcf." (Said new paragraph (b) will be referred to herein as "Article 6(b)").

Clause 6(b) is not a standard clause of common use in the industry, but is a unique provision. Arles H. Barrett, of Amoco, testified that he knows of no other contract containing this clause.

16. All relevant terms and provisions in the separate contracts referred in this case between Phillips and Kerr-McGee with Northern are identical with the contracts between Amoco and Northern from which they were copied or adopted by reference. For brevity references made in these findings to the Supplement will also apply to the Phillips Supplement and the Kerr-McGee Supplement unless otherwise noted.

17. The 1957 Amoco contract is a 41 page document plus an Exhibit A, setting forth the acreage dedicated to the contract, an Exhibit B setting forth the quantities of gas to be delivered,

received and paid for, and an Exhibit C, setting forth a map of the pipeline to be built by Northern from Beaver Creek to Casper. The quantity which Northern is obligated to take or pay for in any year ("take or pay" obligation) is set forth in Exhibit B and is conditioned upon the producers' ability to deliver the specified maximum quantities ("peak deliverability").

18. Article 5 of the 1957 Amoco contract sets forth a base price per Mcf of the gas to be delivered in each of the 20 years during the contract term. The price for year 1959 is 10.17 cents Mcf and each succeeding year's price is incrementally higher; the base price for year 1978 is 20.18 cents.

19. Article 7 of the 1957 Amoco Contract is entitled "Inflation-Deflation Adjustment." It provides for adjustments each year of the Article 5 base price for inflation or deflation determined by references to the Wholesale Price Index. Article 16 of the 1957 Amoco Contract provides by a reference to Article 10 of Chapter 32, WCS 1945, that ad valorem taxes will be borne by the parties against whom the tax is levied and other taxes therein specified assessed against the producers would be reimbursed by Northern to the extent of three-fourths thereof. The Supplement makes no change in Article 16 with respect to ad valorem taxes but increased from seventy-five percent to one hundred percent the amount of reimbursement for other taxes to be paid by Northern.

20. The Supplement amends the 1957 and 1958 contracts in the following respects:

(1) extends the term 12 years and two months to December 31, 1990;

(2) increases the base prices set forth in Article 5 for the period of the next ended term (the base prices for the extended term are set forth for each year providing for a base price of 21.81¢ for year 1979, incrementally higher prices for each year thereafter with a base price of 29.84¢ for year 1990) all subject to adjustment of inflation or deflation;

(3) increases the annual take or pay obligation of Northern relative to the peak deliverability obligation of producers from a ratio of 59% to a ratio of 92.7% beginning in 1970 through 1990 by incorporation of a revised Exhibit B;

(4) redesignates Article 6 of the 1957 contract as Article 6(a) and adds a new Article 6(b) which new article is at the center of the principal controversy herein;

(5) increases the minimum daily quantity that Northern is obligated to receive from 11 thousand Mcf plus deliveries at Salt Creek, to 15 thousand Mcf plus deliveries at Salt Creek and Winkleman Dome;

(6) decreases the delivery pressure obligation of Amoco from 600 psia to 580 psia;

(7) provides that if Amoco is unable to deliver Phosphoria formation gas, Northern nevertheless shall be obligated to purchase an additional quantity from other Beaver Creek formations as will make up the deficiency of Phosphoria formation gas; and

(8) increases the obligation of Northern to reimburse severance and conservation taxes from 75% to 100% but does not change Article 16 as to ad valorem taxes; and

(9) continues the provisions of the 1957 contract authorizing the producers to suspend deliveries and terminate the contracts in the event of a default by Northern.

21. The Supplement was negotiated by Amoco on the premise that there were a number of advantages to be derived from selling the excess gas to Northern. The memorandum from K. W. Beaver to Mr. Hegglund (exhibit I-7) shows that the price from Northern would be better than in an interstate sale, the sale could be started as soon as an agreement was made with Northern, whereas an interstate sale would have required about two years of FPC negotiations. Amoco calculated that Amoco could sell over $15,000,000 of additional gas to Northern during the next eleven years if the reservoir is capable of producing the rates necessary to do this. That number would convert to 25¢ per Mcf for sixty billion cubic feet. Mr.

Beaver therein noted "We need to look at the above deal with Northern in comparison to another deal whereby we would sell the sixty billion cubic feet to a second party and have a two-year delay in marketing because of the FPC requirements." In addition, he notes Amoco needed to look at the benefits that would accrue to Amoco through reduced investment if the sale were to be made to Northern as outlined and the benefit to Amoco of reduced maximum peak requirements.

22. In an early Amoco draft of the proposed Supplement (Exhibit I-8), Mr. Barrett made a note reading "Need an excess of FPC price clause," and Exhibit I-9 is a copy from another contract of a clause which he marked "guide addition." That clause specifically referred to "a just and reasonable rate for the area . . . as prescribed by Order of the Federal Power Commission. . ."

23. Mr. Barrett and Mr. Magagna discussed the addition of a clause which would permit the seller to increase the price to the just and reasonable rate for the area to be established for the Rocky Mountains by the Federal Power Commission. In Amoco's first draft of the Supplement (Exhibit I-8) no clause was contained other than clause 6(a) to provide for an indefinite future price. A clause (Exhibit I-9) was suggested by Amoco to its scrivener to add a provision for escalation equal to the FPC "just and reasonable rate for the area." This clause was not used but in a subsequent draft of the Supplement Amoco inserted in paragraph 4 (Exhibit 10) the essence of clause 6(b). Mr. Barrett testified that this clause was written by Amoco's legal counsel at his direction and that it was his intention that the clause would permit Amoco to collect the highest price received by any producer selling any gas in interstate commerce in the prescribed area without regard to any other conditions.

24. Edwin V. Magagna testified that his understanding of the purpose of clause 6(b) was to provide an alternate price to the specific contract terms in the event that the price which Amoco could have received if it sold the gas to an interstate buyer instead of to Northern in 1970 would be higher than the

specific prices set forth in Article 5 adjusted by Article 7 of the 1957 Gas Sales Contract.

25. The concept of FPC area price controls (as distinguished from well head price controls) was first advanced in the Permian Basin Area Rate Proceedings, 34 FPC 159 (1965), and the concept was approved by the Supreme Court by its decision *In re Permian Basin Area Rate* Cases, 390 U.S. 747 (1968).

26. In 1970 and 1973 the producers were aware that the FPC was proposing new rules to regulate nationwide new sales of natural gas in interstate commerce, specifically including Wyoming. Notices of such proposed rule making and request for comments from all interested parties on rate of return and other factors and of the times and places of public hearings, dated June 17, 1970 and July 17, 1970, were published in the Federal Register. (Exhbits J and K). At that time the FPC had not yet established the boundaries for the area which would include the State of Wyoming. The parties contemplated that the State of Wyoming, with the exception of Lincoln and Uinta Counties, would be one area for FPC area prices.

27. The FPC began establishing rates for the Rocky Mountain Area by FPC Order No. 435, 46 FPC 68, which was issued July 15, 1971. This order identified six sub-areas which the FPC had determined to exist within the Rocky Mountain Area. These sub-areas included the Uinta-Green River Basin Area which including the Wyoming counties of Lincoln, Uinta, Carbon, Sweetwater and Sublette, as well as several other counties in the States of Utah and Colorado. The sub-area defined as Montana-Wyoming Area included the remaining counties in Wyoming.

28. FPC Opinion No. 658, issued April 11, 1973, modified the definition of Uinta-Green River Basin sub-area to include the following Wyoming counties: Albany, Carbon, Sweetwater, Sublette, Lincoln and Uinta, and further provided that the Montana-Wyoming sub-area would include the remaining Wyoming counties.

29. On December 4, 1974, the Federal Power Commission issued its Opinion 699-H, effective June 21, 1974. Therein the Commission established a maximum base rate of $0.50 per Mcf for gas sold in interstate commerce which was produced from wells spudded on or after January 1, 1973. None of the gas that is the subject matter of this action would qualify for this FPC price if it had been sold in interstate commerce. On August 28, 1975, the Federal Power Commission issued FPC Opinion No. 742, effective August 28, 1975. Under this opinion the FPC established the maximum rate for sales made by small producers after August 28, 1975 at 130% of the applicable base ceiling rate established for large producers. The stated purpose of FPC Opinion No. 742 was to recognize the additional costs experienced by small producers and to encourage the drilling by them of exploratory wells to foster the development of new supplies of natural gas by small producers. None of the producers in this action could have qualified as small producers for purposes of FPC Opinion No. 742 had they been selling gas in interstate commerce.

30. On July 27, 1976, the Federal Power Commission issued FPC Opinion No. 770, effective as of July 27, 1976. On November 5, 1976, the FPC amended Opinion No. 770 issuing FPC Opinion No. 770-A, which opinion was retroactively effective as of July 27, 1976. In FPC Opinion No. 770-A the FPC continued the major vintage distinction between old and new gas and provided further vintaging distinctions within the new gas category. These vintaging distinctions were as follows:

A. Gas from wells commenced prior to January 1, 1973, was subject to a base price ceiling of 29½ cents per Mcf.

B. Gas which was not previously dedicated to interstate commerce from wells commenced prior to January 1, 1973, was subject to a base price ceiling of 52 cents per Mcf.

C. Gas from wells commenced after January 1, 1973, and before January 1, 1975, was subject to a base price ceiling of 93 cents per Mcf.

D. Gas from wells commenced on or after January 1, 1975, was subject to a base price ceiling of $1.42 subject to a one cent per quarter escalation.

31. On November 9, 1978, the President of the United States signed the Natural Gas Policy Act of 1978 (NGPA), which then became effective December 1, 1978, and which retained vintaging distinctions. The NGPA is designed to decontrol prices for certain categories of natural gas and are directed primarily at new natural gas wells. The Act does not generally deregulate prices of gas from existing wells.

32. Under Section 105 of the NGPA, for any intrastate contract existing on the date of enactment any gas sold after the enactment date is subject to a maximum lawful price equal to the lower of the contract price or the maximum lawful price as calculated for new natural gas under Section 102 of the NGPA. New natural gas will qualify for price deregulation on January 1, 1985. New natural gas prices increase monthly by reason of an inflation adjustment factor plus a real growth factor.

32. Early in December 1975 Amoco demanded payment from Northern of a price which would include the FPC 130 percent allowance to small producers. (Exhibit I-23). Amoco noted in Exhibit I-23 that if contract vintage were considered the price would be 24¢ or 35¢ per Mcf. Without the small producer allowance and without regard to contract vintage (the date of the Contract to sell natural gas) the FPC price would be 53¢ per Mcf, and the small producer price would be 53¢ times 1.3

34. After FPC Opinion No. 770 was issued and became effective, representatives of Northern and Amoco met in Cheyenne, Wyoming on August 2, 1976 to discuss Amoco's plan to phase in the price increases to which Amoco claimed it was entitled under the terms of the supplemental agreements. Instead of demanding that Northern start immediately paying the amounts to which Amoco claimed entitlement under clause 6(b), Amoco agreed to phase in the price increase over a period

of time. Thereafter Amoco sent a letter dated August 5, 1976, to Northern (Exhibit D). Amoco agreed to give Northern one working day's notice of the new price it would propose to collect and the date of collecting such new price in order that Northern could file an application with the Wyoming Public Service Commission for an increase in tariffs reflecting such increase. Also Amoco therein agreed to waive any claim for payment of any increased price under the contract prior to the date stated in the notice.

35. After FPC Opinion No. 770-A was issued and became effective, Amoco sent a letter to Northern dated December 8, 1976 (Exhibit E) which stated that Amoco elected pursuant to Article 6(b) of the contract to commence collecting prices less than the price resulting from Opinion 770 effective as of January 1, 1977. For gas delivered during the period commencing on January 1, 1977, and ending on June 30, 1977 Amoco was electing to assert collection of a price of $1.06 per Mcf and for gas delivered during the period commencing July 1, 1977 and ending June 30, 1978 Amoco was electing to assert collection of a price of $1.43 per Mcf. Commencing July 1, 1978 Amoco gave notice that it intended to collect the full price resulting from Opinion 770.

36. From the inception of the contract relationship between Northern and the three producers no payments were made directly to Phillips or Kerr-McGee by Northern. Amoco was authorized by Kerr-McGee and Phillips to receive and make settlement for payments of their share of Beaver Creek gas, and Amoco in turn distributed to Phillips and Kerr-McGee their respective shares thereof. (Exhibit A-1).

37. After FPC Order No. 435 became effective and as of January 1, 1972, Amoco calculated that the maximum price it could collect for Beaver Creek Field gas was 19.162¢ per Mcf, including adjustment for inflation and tax reimbursement plus any increase in taxes above the calculated reimbursement. (Exhibit I-22).

38. Northern was faced with the alternative of making payment of the rates requested by or for the producers and obtaining a new tariff allowance from the Wyoming Public Service Commission to cover the increase or suffering a possible termination of the contract and losing its long term supply of natural gas under the default provisions of the contracts. When given this choice, Northern elected to pay the demanded amounts until a settlement could be made or the question of price could be determined. Northern's election to pay the price demanded was based upon its inability to be certain whether or not FPC Opinion No. 770 and FPC Opinion No. 770-A activated said price escalation clause and its inability to withstand termination for non-payment. Additionally if Northern did not obtain an increased tariff from the Public Service Commission, it could not collect the increased price retroactively from its customers, although it could refund any excess payments if the higher prices were reduced by settlement or adjudication.

39. The prices demanded by and paid to the producers by Northern have had an inequitable result, causing rate payers buying gas at retail to be charged exorbitant prices for the natural gas involved in this case grossly beyond any reasonable expectation of Northern as one of the contracting parties.

40. At the times the parties executed the Supplemental Agreement FPC price controls were directed to holding down the price of natural gas on an area pricing basis, determined on the producers' costs plus a reasonable return on investment.

41. At the times the parties executed the Supplemental Agreement, Northern did not contemplate nor was it suggested by any other party that FPC pricing practices then existing and contemplated would materially or substantially change during the term of said contracts.

42. Each of the producers has claimed from the effective date for clause 6(b) that it was entitled thereby to receive the highest price for any gas sold in interstate commerce regardless of the kind of gas, the special circumstances of the sale, extraordinary values attributable thereto, not common or similar to the gas in question or any other circumstances.

43. It was beyond the contemplation of Northern at the time it executed the Supplemental Agreement that FPC Opinion No. 699-H, FPC Opinion No. 742, FPC Opinion No. 770, FPC Opinion No. 770-A and the Natural Gas Policy Act of 1978 would be claimed to activate Article 6(b) so that Northern would be required to pay rates for Beaver Creek gas which would be greatly different or exorbitant in comparison to rates incorporated in the contract between the parties. (Substituted Exhibit 11 and Exhibit G). It is doubtful that the producers contemplated such sharp increases for small producers and new natural gas but their intention was to claim the highest price which might be received by any prodcuers in the Wyoming area for any gas sold in interstate commerce. (Testimony of Arles J. Barrett, and Exhibits I-11, I-13, I-21, as well as the demands for the receipt of payment including small producers' allowance and other escalations reflected on defendants' Exhibit 11).

44. The effect of the supplemental contracts with clause 6(b) contained therein was to provide by an indefinite price escalator clause the benefit of extraordinary price increases authorized by the Federal Power Commission for producers and gas supplies meeting the conditions precedent to receiving such a high price while such conditions could not be met by the producers herein nor by Beaver Creek gas supplies. The effect of clause 6(b) was to obtain the unlimited high price allowed for gas sold in interstate commerce without regard to the interest of Northern and without regard to the interest of the public retail consumers who would be required to pay retail rates sufficient to cover such escalated prices.

45. Without clause 6(b) in the Supplement each producer still has the right to receive increased contract price adjustments for inflation and the benefits of the favored nations clause 6(a) if Northern should pay a higher price to a third party for gas. There is no evidence that Northern has paid a price to a third party supplier of gas in excess of the specific prices otherwise provided in the Supplement excluding the application of clause 6(b). Considering these circumstances,

the contract is one that could result and did result in extreme hardship to the public.

46. Section 105 of the Natural Gas Policy Act of 1978 imposes a ceiling price on Beaver Creek gas commencing December 1, 1978. That ceiling is the lesser of the NGPA Section 102 price applicable to "new" natural gas, or the price under the terms of the contract. The "new" natural gas price adopted by reference therein increases monthly by virtue of an inflation index plus a factor designed to escalate the "new" gas price to the heating value equivalency of fuel oil by January 1, 1985. The "new" gas base price plus allowable tax reimbursement, adjusted to reflect the BTU of Beaver Creek gas, was approximately $2.80 per Mcf at the time of trial. On January 1, 1985 "new" gas will be deregulated. Intrastate gas such as Beaver Creek will also be deregulated on January 1, 1985, unless its price is then being fixed under an indefinite price escalator clause such as clause 6(b). The producers have taken the position that they are entitled to collect the highest price legally permissible. Although Beaver Creek gas is now subject to a ceiling price, there is no assurance it will continue to be so restricted.

47. The cost of Beaver Creek natural gas to consumers served by Northern has increased from a price of approximately 28¢ per Mcf in December of 1975 to a price of approximately $2.80 per Mcf in April, 1980, an increase in slightly over four years of 10 times the price specifically bargained for under Articles 5 and 7 of the contracts. For the consumer a monthly gas bill of $30 has been increased to approximately $250 and is still increasing under clause 6(b) as claimed by the producers.

48. Out of the specific fee or transportation allowance payable to Northern for gas delivered to Casper refinery, Salt Creek and Winkelman Dome, Northern must bear the cost of line loss which averages two percent of the gross quantities transported. If clause 6(b) is enforced, the cost to Northern of the two percent line loss would exhaust the entire transportation allowance of 5¢ per Mcf for transportation of the gas

delivered from Beaver Creek to Amoco's Standard Refinery at Casper, Wyoming and such transportation would be provided by Northern at a loss.

49. The evidence in the record does not support the interpretation of clause 6(b) to include a right to reimbursement of ad valorem taxes assessed against the producers. Article 16 of the contracts is not specifically changed or amended by clause 6(b) nor are any adjustments to price included therein. The substituted Exhibit 11 of the producers reflects producers' claims of a right to recover from Northern the amount of ad valorem taxes which were reimbursed to third-party sellers under FPC provisions applicable to the interstate sale even though higher than ad valorem taxes on Beaver Creek gas. The Court finds no factual basis to permit the producers to recover ad valorem taxes paid by a third party on production not related to Beaver Creek.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter in this action pursuant to 28 U.S.C. § 1332.

2. Once the Public Service Commission has accepted for filing a gas purchase contract, the cost of gas thereunder is recoverable as a matter of law through rates sufficient to pay such costs plus the cost of the utility service plus a reasonable rate on investment. Title 37, W.S. 1977. *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 692-693 (1923); *FPC* v. *Hope Natural Gas*, 320 U.S. 591, 603 (1944).

3. This case involves a substantial public interest, it appearing from the record that approximately 85% of the total gas acquired by Northern for resale to the public is limited to the gas it receives under the 1957 Gas Sales Contract as supplemented and that all such gas is sold principally to residential consumers in the communities of Lander, Riverton and Casper and intervening areas, and a part of such gas is sold to Northern Gas Company and results in increased prices to users in its

service area which includes Rawlins, Laramie and intervening communities.

4. The increase in price occurring since clause 6(b) became effective from approximately $0.28 per Mcf to the current $2.80 per Mcf has the effect of increasing the residential consumers' monthly gas bill from an assumed $30 per month to a figure of approximately $250 per month. The cost of converting a natural gas heating system to an alternate fuel in a typical home in the areas served would require a capitalized expenditure of $2,500 or more.

5. The public interest is further demonstrated by the fact that all the parties in this case knew that the gas sold and committed under the Supplement (except for the portion purchased at Northern's cost by Amoco) would be resold to consumers who would be required to pay a price for such gas in excess of the price received by the producers from Northern as a regulated public utility.

6. Arles H. Barrett who negotiated the Supplement for Amoco testified that clause 6(b) was a new and unique clause and not one used in any other contract of which he had knowledge. It was designed and written (except for its effective date) by legal counsel on the staff of Amoco in Denver and was intended to provide that Amoco would be entitled to the highest possible price for the Beaver Creek gas based upon the highest price paid for any gas produced in Wyoming (except two counties) and sold in interstate commerce without regard to the fact that such highest price interstate gas might be priced as the result of higher BTU's (heating value), lower pressure base, higher taxes included in the price, and also without regard to extraordinary FPC price allowances contrary to the national public policy except for special conditions not common to Beaver Creek gas nor to the producers.

7. The intention and demands of Amoco, Phillips and Kerr-McGee for prices exacted from Northern Utilities, Inc. were designed to and will result in an inequitable, illegal and oppressive result, causing rate payers in the areas served to be

charged exorbitant prices for the natural gas involved in this case. Clause 6(b), as intended by the producers and as now interpreted by them, was unconscionable and against public policy in its design at its inception and since then their intentions have been corroborated by the results.

8. The public interest is further demonstrated by the fact that Amoco recognized the steepening spiral of prices and hardships resulting to public consumers by suggesting a phase-in price. The evidence pertaining thereto shows that the purpose of the phase-in was to assist Amoco in its public relations and not to serve the interests of the public consumer. Amoco in argument before this Court has reverted to its contention that it is entitled to the highest price possible under clause 6(b) in spite of Amoco's voluntary election to phase in such highest prices over a period of 18 months.

9. The central issue in this case is whether under the powers of equity and the provisions of § 34-21-219 W.S. 1977, this Court should strike down clause 6(b) as void against public policy and unconscionable at the time the parties entered into the contract and enforce the remainder of the contract with clause 6(b) omitted therefrom.

10. Ordinarily it is desirable that parties be protected in their right to make and enforce agreements between themselves, but this right is limited by the rule that an agreement must not be contrary to public policy. *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923).

11. The Courts will deny enforceability of a contract provision that clearly contravenes the public right or the public welfare or gravely violates paramount requirements of public interest. *Chicago and North Western Railway Co.* v. *Rissler*, 184 F.Supp. 98 (Wyo. 1960), *Northwest Airlines, Inc.* v. *Alaska Airlines, Inc.*, 351 F.2d 252 (9th Cir. 1965).

12. It is a fundamental doctrine that the extent to which a court of equity may grant or withhold its aid and the manner of molding its remedies is dictated by the public interests involved. *United States* v. *Morgan*, 307 U.S. 183 (1939).

13. The courts of equity will refuse to decree specific performance of a contract provision where the result would be unconscionable or unjust. *U.S.* v. *Georgia Pacific Co.*, 421 F.2d 92 (9th Cir. 1970), *Union Pacific Railroad Co.* v. *Chicago R.I.&P.R. Co.*, 163 U.S. 564 (1896), *Campbell Soup Co.* v. *Wentz*, 172 F.2d 80 (3rd Cir. 1948). Courts of equity will not assist a party seeking to enforce a hard bargain. *Keller* v. *California Liquid Gas Corp.*, 363 F. Supp. 123 (Wyo. 1973).

14. A court should not hesitate to refrain from enforcing a contract provision when there is some overriding reason for public concern and the contract provision in some way causes real harm to the public. *Hudson Waterways Corp* v. *Coastal Marine Service, Inc.*, 436 F. Supp. 597 (E.D. Tex. 1977).

15. The United States Supreme Court has indicated that indefinite escalator clauses by their design and function alone may be "incompatible with the public interest." *In Re Permian Basin Area Rate Cases*, supra, at pg. 783 (1968).

16. This Court finds as a matter of law that clause 6(b) as it is interpreted by the producers, viewed in the light of the producers' intentions at the time each executed the Supplement and evidenced by their actions in demanding the highest price paid for any gas sold in interstate commerce without regard to substantial differences in such gas and the conditions precedent to such high prices being authorized, is a clause that is void as against public policy and unconscionable under § 34-21-219 W.S. 1977. Throughout the proceedings the producers have demanded that they be paid FPC prices designed and justified only for small producers when none of the producers could qualify as a small producer under the regulations which permitted such bonus price to be paid. This is contrary to the policy of the United States, whose special allowances were specifically withheld from gas sold in interstate commerce but equivalent in all other respects to the gas involved in this case.

17. The case of *Bradford* v. *Plains Cotton Cooperative Assn.*, 539 F.2d 1249 (10th Cir. 1976) presented a factual situation unlike the facts in the instant case. In the *Bradford*

case, farmers who raised cotton had made forward contracts for the sale of cotton to a cooperative. The contracts for the sale of cotton were made for specific price pursuant to a schedule for cotton to be delivered within a specific time, namely, the growing season. The cotton buyer could and did protect itself by promptly selling cotton or cotton futures to avoid risk. The cotton contracts ran for a period of six months. Unlike the clause in *Bradford*, clause 6(b) in the instant case operates for a period of twelve years. Northern cannot sell futures in natural gas nor sell surplus gas from Beaver Creek, the only market being an interstate market, and the contract itself forbids a sale of Beaver Creek gas in the interstate market. In the *Bradford* case the parties could not foresee and did not contemplate that the government might lift the acreage restriction on cotton planting. In the instant case the producers are substantial producers in the nation-wide natural gas producing industry, and they were aware of the then current proposals to change ceiling prices and methods concerning them as stated in the notices of the FPC in June and July 1970 (Exhibits J and K). Phillips and Kerr-McGee had much later knowledge of the prospects for drastic increases since they signed the Supplements in 1973. In the instant case there is no contention by the producers that the prices under Article 5, adjusted by Article 7, were unfair. But since the provisions of clause 6(b), as intended by the producers, would remove all price restraints from the contract and fix a then indefinite price that would result in windfalls to the producers and would result in unjustly burdensome and harsh results to the consumers, clause 6(b) was unconscionable at the time of its making. In the *Bradford* case the cotton buyer experienced a gain in income under the cotton contracts of less than nine-tenths of one percent. In the case at bar the producers were profitably selling natural gas at $0.28 per Mcf, and now demand ten times that figure, an increase of 900% or more. Finally, the sale of cotton in the *Bradford* case did not involve a public interest; while the case at bar involves a substantial public interest. This Court is persuaded that the *Bradford* case is distinguishable from the case at bar on its facts.

18. The case of *Amoco Production Co.* v. *Stauffer Chemical Company of Wyoming*, (Wyoming Supreme Court Docket No. 5257—Opinion published June 9, 1980) presented a factual situation unlike the one presently before us. No argument was made in *Stauffer* that the particular clause involved in that case was unconscionable or against the public interest. The fact that the Wyoming Supreme Court upheld the favored nations clause found in *Stauffer* is of little consequence in this situation. The Court has the ability to pass directly on the unconscionability of each individual contract or particular clause therein in light of the general commercial background and needs of each case and to limit unconscionable contract provisions so as to avoid unconscionable results. § 34-21-219 W.S. (1977) and official comments to the Uniform Commercial Code.

19. Favored nations clauses "naturally grant an advantage to the seller. As such, they have generally been construed in favor of the buyer and against the seller. Neither the courts, nor regulatory agencies dealing with such clauses, have looked upon them with favor. . . . There need be no economic or other substantial justification for the increase." *Superior Oil Company* v. *Western Slope Gas Co.*, 604 F.2d 1281, concurring Opinion at pg. 1295 (10th Cir. 1979).

20. The indefinite escalation clause in this instance causes price increases to occur without reference to the economics and circumstances of the particular operation. *Permian Basin Area Rate Cases*, supra.

21. As such, paragraph 6(b) causes windfall profits and substantially increases the cost to consumers for a commodity without which they may well not be able to live. The impact of such escalations could well be devastating on the general public in the communities served by Northern. *Superior Oil Company* v. *Western Slope Gas Company*, supra, concurring opinion at pg. 1296 (10th Cir. 1979).

22. When a provision of a contract is void as against public policy or unconscionable, the Court may enforce the remainder of the contract without the undesired clause. *Driessen* v. *Fre-*

borg, 431 F. Supp. 1191 (N.D. 1977), *Union Tank Car Co.* v. *Lindsay Soft Water Corp. of Omaha, Inc.*, 257 F. Supp. 510 (D.C. Neb. 1966), § 34-21-219 W.S. (1977).

23. With respect to clause 6(a) in the Supplement, there is no contention that any price has been activated thereby nor any issue of fact existing therewith. Northern moved to dismiss any claim concerning clause 6(a) without prejudice. The Court concludes that clause 6(a) should remain in the contract in the event that it may activate higher prices in the future, subject at that time to a determination of the question then presented whether it is valid and enforceable under such facts and circumstances as the evidence at that time may disclose.

24. The payments demanded of and paid by Northern Utilities, Inc. to Amoco and in turn to Phillips and Kerr-McGee under said clause 6(b) were illegal, and the amounts so paid in excess of the price determined under the other provisions of the 1957 contract as supplemented should be refunded to Northern Utilities, Inc. who, in turn, has agreed to make refunds to its rate payers in accordance with orders of this Court and the Public Service Commission of Wyoming.

25. Judgment shall be entered in conformane with these Findings of Fact and Conclusions of Law.

Dated this 23rd day of October, 1980.

/s/ Clarence A. Brimmer
United States District Judge

APPENDIX A-5

Supplemental Judgment Of District Court Below

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C78-006-B
No. C78-081-B
Consolidated

KERR-MCGEE CORPORATION, a Delaware corporation,
Plaintiff,

v.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Defendant.

NORTHERN UTILITIES, INC., a Wyoming corporation,
Plaintiff,

v.

AMOCO PRODUCTION COMPANY, a Delaware corporation,
and PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,
Defendants.

FILED
NOV. 20, 1980

SUPPLEMENTAL JUDGMENT

The above-captioned matter came on for hearing before the Court on November 7, 1980, for determination of the amount of overpayments, interest thereon and security or supersedeas bonds to stay the judgment and supplemental judgment during the pendency of an appeal, Amoco Production Company appearing by and through its attorneys, John S. Pfeiffer and R. H. Landt; Kerr-McGee Corporation appearing by and

through its attorney William T. Schwartz; Phillips Petroleum Company appearing by and through its attorney, Dale A. Mayer; Northern Utilities, Inc., appearing by and through its attorneys, Wm. H. Brown, Claude W. Martin and W. Bryce Arendt; and the parties having stipulated in open Court as to the amounts of principal and interest for which judgment is granted to Northern Utilities, Inc. and against each other party and the post-judgment interest rate after November 7, 1980 on the respective amounts of the judgment, and the Court being fully advised;

NOW, THEREFORE, and supplemental to the judgment herein of October 23, 1980, IT IS

ORDERED, ADJUDGED AND DECREED that Northern Utilities, Inc., recover of Amoco Production Company, the sum of $59,603,631.02. with interest thereon to November 7, 1980, in the amount of $6,772,704.14 for a total of $66,376,335.16; it is

FURTHER ORDERED, ADJUDGED AND DECREED that Northern Utilities, Inc. recover of Kerr-McGee Corporation, the sum of $3,549,202.07, with interest thereon to November 7, 1980, in the amount of $408,047.82 for a total of $3,957,249.89 it is

FURTHER ORDERED, ADJUDGED AND DECREED that Northern Utilities, Inc. recover of Phillips Petroleum Company, the sum of $4,605,734.34, with interest thereon to November 7, 1980, in the amount of $529,516.16 for a total of $5,135,250.50 it is

FURTHER ORDERED, ADJUDGED AND DECREED that the judgment in the total amount of $75,468,835.55, herein granted to Northern Utilities, Inc. against said parties in their respective total amounts stated above shall bear interest at the rate of 10% per annum from and after November 7, 1980 until paid; it is

FURTHER ORDERED pursuant to stipulation of the parties in open Court and Rule 8 of the Federal Rules of Appellate

Procedure, that if Amoco Production Company, Kerr-McGee Corporation, and Phillips Petroleum Company perfect an appeal from said judgment of October 23, 1980 as supplemented hereby, they may file with this Court, in form approved by counsel for Northern Utilities, Inc., a duly executed, written guaranty of payment to Northern Utilities, Inc. of the full amount of the judgment plus interest against each of said parties, respectively, which shall be in lieu of a supersedeas bond or other security to stay the judgment as supplemented hereby; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the terms and provisions of this supplemental judgment are incorporated into the judgment entered herein on October 23, 1980 the same as if set forth therein.

Dated this 20th day of November, 1980.

/s/ Clarence A. Brimmer
United States District Judge

APPENDIX A-6

Uniform Commercial Code, Comments To Section 2-301, American Law Institute (1962)

OFFICIAL COMMENT

Prior Uniform Statutory Provision: None

Purposes:

1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz, 172 F.2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; Hardy v. General Motors Acceptance Corporation, 38 Ga. App. 463, 144 S.E. 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; Andrews Bros. v.

Singer & Co. (1934 CA) 1 K.B. 17, holding that where a car with substantial mileage was delivered instead of a "new car," a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act called such an implied warranty; New Prague Flouring Mill Co. v. G. A. Spears, 194 Iowa 417, 189 N.W. 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the seller's advantage; and Kansas Flour Mills Co. v. Dirks, 100 Kan. 376, 164 P.273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; Green v. Arcos, Ltd. (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; Austin Co. v. J. H. Tillman Co., 104 Or. 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; Robert A. Munroe & Co. v. Meyer (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of

clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

APPENDIX A-7

Article 6(b) To The Contracts In This Case*

ARTICLE 6(b)

From and after January 1, 1976, when the price to be paid by Northern to Pan American pursuant to the other provisions hereof is less than the sum of the price received for gas being sold in interstate commerce, by any producer within the State of Wyoming, except in the counties of Uinta and Lincoln, plus three cents per one thousand cubic feet (3¢/MCF), then Northern shall increase the price to be paid Pan American hereunder to a price equal to the price being received by such producer plus three cents per MCF.

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* It should be noted that the reference to "Pan American" in the clause refers to Pan American Petroleum Corporation, the corporate predecessor of Amoco. The language of the clauses in the Kerr-McGee and Phillips contracts is identical except their names are substituted for that of Pan American.